Supreme Court, U.S.
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CAUSE NO. _____

IN THE SUPREME COURT OF THE

UNITED STATES OF AMERICA

OCTOBER, 1994 - TERM

CEDRIC SHELLEY, Petitioner
vs. State of Texas
On Petition From Writ of Certiorari
From the Texas Court of Criminal Appeals

PETITION FOR WRIT OF CERTIORARI

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105 pp

I. QUESTIONS PRESENTED FOR REVIEW

Questions for Review:

A. Did the trial court's instructions to the jury during voir dire ("This Defendant, and a Defendant in any criminal case in this country, is presumed to be innocent until his guilt has been established by legal contest, beyond a reasonable doubt. You ladies and gentlemen [of the jury] will have that burden, I guess you would call it, to determine whether or not the evidence, after you have heard it all --"). Emphasis supplied. deprive Petitioner of due process and a fair trial by shifting the burden of proof from the state to the jury?

B. Did the Court of Appeals err as a matter of constitutional law depriving Petitioner of due process of law when it held that intent to deliver may be inferred from the quantity of cocaine alone since the inference could not have been drawn by the jury on this issue because the charge was constitutionally infirm?

C. Did the trial court's imposition of a life sentence after the jury verdict constitute cruel and unusual punishment in contravention to the U.S.C.A. Const. Amend. 8?

D. Was petitioner denied effective assistance of counsel in violation of U.S.C.A. Const. Amend. 6.?

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TABLE OF AUTHORITIES

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2. Estelle v. Gamble, 429 U.S. 20, 97 S.Ct. 29, 50 L.Ed. 2d, 25, (1976).

3. Hutto v. Finney, 437 U.S. 678, 98 S.Ct. 2565, 57 L.Ed 522 (1978).

4. Ramirez v. Jones, 530 F.Supp. 345 (1981).

5. Sandstrom v. Montana, 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed. 39, (1979).

6. Solem v. Helm, 463 U.S. 277, 103 S.Ct. 3001, 77 L.Ed 2d 637 (1983).

7. Allen v. State, 686 S.W.2d 685 (Tex. App. 4 Dist. 1985).

8. Martinez v. State, 576 S.W.2d 854, (Tex. Crim. App. 1979).

9. Turner v. State, 755 S.W.2d 207 (Tex. App. - Houston [14th Dist.] 1988).

10. U.S.C. Amend. 5.
No person...shall be deprived of life, liberty, or property, without due process of law.

11. U.S.C. Amend. 6.
In all criminal prosecutions the accused shall enjoy...and to have assistance of counsel for his defense.

12. U.S.C. Amend. 8.
Excessive bail shall not be required, nor excessive fines imposed, nor cruel or unusual punishment inflicted.

13. U.S.C. Amend. 14.
...Nor shall any state deprive any person of life, liberty, or property without due process of law.

14. Texas Constitution, Vernon's Ann. St. Const. Art. 1, § 13.

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OFFICIAL REPORTS

1. United States Reports.

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1. August 2, 1994, Court of Criminal Appeals denial to entertain Motion For Rehearing on Petition For Discretionary Review.

2. 28 U.S.C. 1254, 1257.

VI. CONSTITUTIONAL PROVISIONS

1. 5,6,8,14 U.S. Constitution Amendments.

2. Article 1 Section 13 of the Texas Constitution.

VII. STATEMENT OF THE CASE

The trial court sentenced petitioner to life imprisonment in Cause No. 631357 after a jury found him guilty of possession of a controlled substance with intent to deliver. The Petitioner was sentenced in the 209th Judicial District Court of Harris County, Texas, on the 23rd day of September, 1992.

The Fourteenth Court of Appeals at Houston affirmed. Petition For Discretionary Review was overruled and dismissed by operation of law on the 2nd day of August, 1994, when the Court of

Criminal Appeals refused to entertain a Motion For Rehearing on Petition For Discretionary Review.

The trial court's voir dire on page four of the testimony states, inter alia,

"This Defendant, and a Defendant in any criminal case in this country, is presumed to be innocent until his guilt has been established by legal contest, beyond a reasonable doubt. You ladies and gentlemen [of the jury] will have that burden, I guess you would call it, to determine whether or not the evidence, after you have heard it all --". Emphasis supplied.

Moreover, in affirming the judgment of the trial court, the Fourteenth Court of Appeals directly held that "intent to

deliver" may be inferred from quantity alone. The court's charge provided in relevant part:

"Under **our** law, cocaine is a controlled substance." Then it purports to define "delivery" and "possession". It further provides:

"A person acts intentionally or with intent, with respect to the nature of his conduct or to a result of his conduct when it is his conscious objective or desire to engage in the conduct or cause the result."

At the end of the punishment phase, his trial counsel rested with no evidence. Statement of Facts Volume Four. Petitioner contends, inter alia, that his life sentence, was cruel and

unusual and in no small part imposed by the trial court because of trial counsel's ineffective assistance of counsel.

Grounds "A" and "B" were raised for the first time in his Petition for Discretionary Review. See Appendix and in his Motion For Rehearing therein. See Appendix.

Grounds "C" and "D" were raised in his appeal to the 14th Court of Appeals. See Appendix.

VIII. STAGE OF PROCEEDINGS

See last two paragraphs of Roman Numeral Seven. supra.

IX. REASON FOR GRANTING WRIT

Petitioner reiterates the first of four questions for review, "A", supra, and in support of an affirmative finding to that inquiry would show this Honorable Court the following:

Petitioner contends that the trial court's instruction to the jury during voir dire rose to the highest level of constitutional infirmity because it had the effect of either:

(1). Shifting the burden of proof on the **whole case**, not only on isolated elements from the State to the jury, or; emphasis supplied.

(2). Totally eliminating the state's burden of proof.

Petitioner anticipates the State will argue the trial court made several attempts to cure this constitutionally infirm charge. He most vigorously submits, however, that what may be characterized by the State as curative efforts were nothing more than exacerbative of the confusion placed in the minds of the jury at the very outset which stayed with them throughout the entire proceeding rendering it violative of due process.

Support for his position under this ground is found in Sandstrom v. Montana, 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed. 39, (1979). The Sandstrom view was followed

in Ramirez v. Jones, 530 F.Supp. 345 (1981), wherein the court stated:

"It is patently clear that in Sandstrom the Court was concerned with the impact of the erroneous instruction upon the jury, and whether a reasonable juror could have interpreted the instructions as shifting or eliminating the People's burden of proof."

The Sandstrom court stated:

"That determination requires careful attention to the words actually spoken to the jury, for whether a defendant has been accorded his constitutional rights depends upon the way in which a reasonable juror could have interpreted the instruction."

Your Petitioner most respectfully requests that these tainted words not be perceived by this court as falling on the ears of highly trained legal personnel but it rather view their impact by what impact they may have had on his jury. He contends that his jury had only a split second to be impacted by these words whereas their impact on his entire life is being carefully analyzed and scrutinized by the finest legal minds in the Western world. This he claims is the true test to be gleaned from the holding in Sandstrom, supra.

He now asks this court to take judicial notice that the words "establish" and "prove" are synonyms and as such may be used interchangeably.

Petitioner contends such error is fundamental because it was an error in the court's instruction which went to the very basis of the case and failed to state and apply the law under which the accused is prosecuted. Martinez v. State, 576 S.W. 2d 854, (Tex. Crim. App. 1979). Texas does not depart from the strict standard that in a criminal case the burden of proof is on the State to establish all elements of the offense beyond a reasonable doubt. Allen v. State, 686 S.W.2d 685 (Tex. App. 4 Dist. 1985).

The Allen court further held that a shift in the burden of proof of an essential element of the crime rises to constitutional proportions, and renders

the trial fundamentally unfair, and such error is reviewable for the first time on appeal. Martinez defines fundamental error.

Petitioner concludes under this point that per Sandstrom, supra, the challenged instructions to the jury had the effect of either:

(1). Shifting the burden of proof from the State to the **jury**, or;

(2). Totally eliminating it at the very outset of the proceeding setting the stage in the minds of the jury of a confusing burden which it was prohibited to maintain and which the state, failed to maintain.

Petitioner now asks this Honorable Court to answer question "B", supra, affirmatively.

He contends the Court of Appeals erred as a matter of constitutional law in holding that "intent" may be "inferred" from quantity. Emphasis added. He claims since the charge was constitutionally infirm for the reasons stated the jury was not permitted to draw such an inference. Therefore, the Court of Appeals in its limited fact finding role would not have been permitted to draw this inference.

The charge to the jury provides, in relevant part:

"Under our law, cocaine is a controlled substance" Emphasis added. Then it purports to define "delivery" and "possession".

It then provides:

"A person acts intentionally, or with intent, with respect to the nature of his conduct or to a result of his conduct when it is his conscious objective to engage in the conduct or cause the result."

He contends the above charge is the functional equivalent of the following charge condemned in Sandstrom as being constitutionally infirm:

"**The law presumes** that a person intends the ordinary consequences of his voluntary acts."

He contends the modifier "**under our law**" in his case is the functional equivalent of the term "**the law presumes**" found in Sandstrom because at least in

the minds of a reasonable juror, no evanescent distinction can be made between them.

Thus, the impact on the jury of the charge in this case can be no less infirm than the charge in Sandstrom. This court, after much analysis of the distinctions vis a vis inferences and presumptions stated:

"Thus, the question before this court is whether the challenged jury instruction had the effect of relieving the State of the burden of proof enunciated in Winship on the critical question of petitioner's state of mind, we conclude that under either of the two possible interpretations set out above, precisely that effect could result and

that the instructions therefore, presented constitutional error."

Your Petitioner respectfully submits that neither the jury nor the appellate court were permitted to draw the inference the appellate court did in its holding, referenced to above, inferring intent to deliver. In County Court of Ulster County v. Allen, 442 U.S. 140, 157, 99 S.Ct. 2213, 60 L.Ed. 2d 777 (1979), the court stated:

"A permissive inference allows, but does not require the jury to infer the ultimate fact from proof of the basic one. The permissive inference leaves the trier of fact free to credit or reject this inference and does not shift the burden of proof; it affects the

application of the beyond a reasonable doubt only if under the facts of the case, there is no rational way the trier of fact could have made the connection permitted by the inference."

Petitioner contends that "intent to deliver" cannot be a permissive inference because it defies the very definition of the one described above in County Court. Why? Defendant contends as follows: There must be proof by someone of some basic fact before the ultimate fact can be inferred. He asks if the ultimate fact is "inferring intent" by quantity, what is the basic fact and who must prove it? He submits that in this specific case the basic fact must be what quantity of contraband is enough for personal use

only and once again asks, who must prove it. He then submits that if the basic fact to be proven is how much contraband is enough for personal use only, this constitutionally infirm requirement that such amount be proven by someone shifts the burden from the State to him before the ultimate fact "intent" to deliver, may be inferred.

He concludes, therefore, and submits such conclusion finds support in the following holding in Sandstrom, that any requirement placed on him to show that any given amount of contraband and cash, was enough for personal use only, whether or not rebuttable, operated to shift the burden of proof to him thus violating his due process rights:

"But, more significantly, even if a jury could have ignored the presumption and found defendant guilty because he acted knowingly, we cannot be certain that this is what they did do. As the jury's verdict was a general one [as here], we have no way of **knowing** that Sandstrom was not convicted on the basis of the unconstitutional instruction. And [it] has long been settled that when a case is submitted to the jury on alternative theories the unconstitutionality of any of the theories requires that the conviction be set aside."

An unconstitutional jury instruction on an element of the crime can never constitute harmless error. Sandstrom,

supra. Therefore, Petitioner submits the Court of Appeals denied him his due process rights in holding "intent" may be inferred by quantity alone. In summary under this ground he contends:

1. The holding of the appellate court was unconstitutional because it could not have made such a inference because the jury was not permitted to being violative of due process, and

2. Such error being fundamental was not waived and is reviewable for the first time on appeal.

Question C reiterated. Petitioner asks the court to answer affirmatively the following question:

> Did the trial court's imposition of a life sentence after the jury verdict constitute cruel and unusual punishment in contravention to the U.S.C.A. Const. Amend. 8?

In support of his contention that the sentence of life imprisonment was cruel and unusual punishment he would show:

Appellant was sentenced to life in prison for possession with intent to deliver over 400 grams of cocaine (R.V-20). This sentence both violates the United States Constitution, U.S.C.A. Const. Amend 8, and the Texas Constitution, Vernon's Ann. St. Const. Art. 1, § 13. Hutto v. Finney, 437 U.S. 678, 98 S.Ct. 2565, 57 L.Ed 522 (1978), holds that the eight amendment prohibits more than physically laborious punishments but also prohibits grossly disproportionate penalties. This sentence is grossly disproportionate to the crime, because the appellant has never before been convicted of a felony,

no violence was used by the appellant, and he was convicted on the theory he was a party. Solem v. Helm, 463 U.S. 277, 103, S.Ct. 3001, 77 L.Ed 2d 637 (1983) holds that no penalty is per se constitutional. Each case must be considered individually. Estelle v. Gamble, 429 U.S. 20, 97 S.Ct. 29, 50 L.Ed. 2d, 25, (1976) holds that punishment which is incompatible with the evolving standards of decency that mark progress of a maturing society or which involve unnecessary or wanton infliction of pain are repugnant to the Eight Amendment. Because of the Eight Amendment reflects an evolving society, what was not cruel and unusual punishment in the past may be cruel and unusual punishment under today's standards. Texas is clearly about to change it's standards regarding punishment. The

Texas Penal Code is currently under revision. It is my understanding that the punishment for just about all drug offenses will be decreased. We clearly have reached the stage of evolution that life in prison is much too long a sentence for appellant.

Question D reiterated. Petitioner asks this Court to answer affirmatively the following question:

> Was petitioner denied effective assistance of counsel in violation of U.S.C.A. Const. Amend. 6.?

In support he would show:

Appellant's attorney, Thomas Jackson, did not provide the appellant reasonably effective assistance of counsel at the punishment stage of the trial. Turner v. State, 755 S.W., 2d 207

(Tex. App. - Houston [14th Dist.] 1988) holds that the test to see if reasonably effective assistance of counsel was rendered is by judging the totality of the representation. Mr. Jackson rested with no evidence to present at the punishment stage of the trial (R.V-4). The appellant is not eligible for probation but Mr. Jackson is under the mistaken impression that he can be granted probation.

R.V - 10,11

> Mr. Jackson: "---- I believe that probation for this fellow, this young fellow would be a fitting ----."

Mr. Jackson was completely unaware that the minimum sentence was 15 years.

R.V --11

> Mr. Jackson: Of course, Your Honor my

> argument is the minimum is not 15 years under the circumstances.

Mr. Jackson was unaware that the chemist testified that actual weight of cocaine was 562.8 grams of pure cocaine (VIII-112).

R.V -16

> Mr. Jackson: The chemist gave the actual weight and it was less than 400 grams.

Nothing Mr. Jackson said or did at the punishment stage helped the appellant. Mr. Jackson seemed confused about the punishment hearing. If the totality of the punishment hearing is considered it is clear that the appellant was not offered reasonably effective assistance of counsel. Exhibit A is an affidavit by an investigator. Exhibit A shows that proper pretrial investigation

was not done. A critical witness, Mary Moreno, was never contacted by Thomas Jackson's office.

X. CONCLUSION

For the reasons stated above Petitioner was denied due process of law because (1) The burden of proof to show his guilt was either totally eliminated or transferred to the jury and the appellant court erred in holding intent to distribute cocaine may be inferred by quanity alone because such inference is prohibitied by Sandtrom v. Montana, supra. He now seeks reversal of the conviction below.

XI. APPENDIX

1. Charge To The Jury.

2. Statement of Facts Volume 1 page 4.

3. Trial Court's Judgment Affirmed from the Fourteenth Court of Appeals.

4. Appellant's Petition For Discretionary Review.

5. The Court of Criminal Appeal rejection for the notice for Rehearing of the Petition for Discretionary Review of August 2, 1994.

CAUSE NO. 631357

THE STATE OF TEXAS	§	IN THE 209TH
VS.	§	DISTRICT COURT,
CEDRIC SHELLEY	§	TEXAS AUGUST TERM, A.D., 1992

Members of the Jury:

The defendant, Cedric D. Shelley, stands charged by indictment with the offense of possession with intent to deliver a controlled substance, namely, cocaine, weighing at least 400 grams by aggregate weight, including any adulterants or dilutants, alleged to have been committed on or about the 28th day of April, 1992, in Harris County, Texas. The defendant has pleaded not guilty.

A person commits an offense if he intentionally or knowingly possesses with

intent to deliver a controlled substance. Under our law, cocaine is a controlled substance.

"Delivery" means the actual or constructive transfer from one person to another of a controlled substance, whether or not there is an agency relationship. Constructive transfer is the transfer of a controlled substance either belonging to an individual or under his direct or indirect control by some other person at the instance or direction of the individual accused of such constructive transfer. It also includes an offer to sell a controlled substance. Proof of an offer to sell must be corroborated by a person other

than the offeree or by evidence other than a statement of the offeree.

"Possession" means actual care, custody, control or management. Possession is a voluntary act if the possessor knowingly obtains or receives the thing possessed or is aware of his control of the thing for a sufficient time to permit him to terminate his control.

A person acts intentionally, or with intent, with respect to the nature of his conduct or to a result of his conduct when it is his conscious objective or desire to engage in the conduct or cause the result.

A person acts knowingly, or with knowledge, with respect to the nature of

his conduct or to circumstances surrounding his conduct when he is aware of the nature of his conduct or that the circumstances exist. A person acts knowingly, or with knowledge, with respect to a result of his conduct when he is aware that his conduct is reasonably certain to cause the result.

All persons are parties to an offense who are guilty of acting together in the commission of the offense. A person is criminally responsible as a party to an offense if the offense is committed by his own conduct, by the conduct of another for which he is criminally responsible, or by both.

A person is criminally responsible for an offense committed by the conduct

of another if, acting with intent to promote or assist the commission of the offense, he solicits, encourages, directs, aids, or attempts to aid the other person to commit the offense. Mere presence alone will not constitute one a party to an offense.

Now, if you find from the evidence beyond a reasonable doubt that on or about the 28th day of April, 1992, in Harris County, Texas, the defendant, Cedric D. Shelley, did then and there unlawfully intentionally or knowingly possess with intent to deliver, a controlled substance, namely, cocaine, weighing at least 400 grams by aggregate weight, including any adulterants or dilutants; or if you find from the

evidence beyond a reasonable doubt that on or about the 28th day of April, 1992, in Harris County, Texas, another person or persons did then and there unlawfully intentionally or knowingly possess with intent to deliver, a controlled substance, namely, cocaine, weighing at least 400 grams by aggregate weight, including any adulterants or dilutants, and that the defendant, Cedric D. Shelley, with the intent to promote or assist the commission of the offense, if any, solicited, encouraged, directed, aided or attempted to aid the other person or person to commit the offense, if he did, then you will find the

defendant guilty as charged in the indictment.

Unless you so find from the evidence beyond a reasonable doubt, or if you have a reasonable doubt thereof, you will acquit the defendant and say by your verdict "Not Guilty."

In arriving at your verdict, you must totally disregard what you believe is my opinion about factual matters, and you will not consider or speculate upon any remark, comment or ruling which I have made or may make, or may not have made or may not make during this trial.

A Grand Jury indictment is the means whereby a defendant is brought to trial in a felony prosecution. It is not evidence of guilt nor can it be considered by you in passing upon the question of guilt of the defendant. The

burden of proof in all criminal cases rests upon the State throughout the trial and never shifts to the defendant.

All persons are presumed to be innocent and no person may be convicted of an offense unless each element of the offense is proved beyond a reasonable doubt. The fact that he has been arrested, confined, or indicted for, or otherwise charged with the offense gives rise to no inference of guilt at his trial. The law does not require a defendant to prove his innocence or produce any evidence at all. The presumption of innocence alone is sufficient to acquit the defendant, unless the jurors are satisfied beyond a reasonable doubt of the defendant's guilt

after careful and impartial consideration of all the evidence in the case.

The prosecution has the burden of proving the defendant guilty and it must do so by providing each and every element of the offense charged beyond a reasonable doubt and if it fails to do so, you must acquit the defendant.

It is not required that the prosecution prove guilt beyond all possible doubt; it is required that the prosecution's proof excludes all "reasonable doubt" concerning the defendant's guilt.

A "reasonable doubt" is a doubt based on reason and common sense after a careful and impartial consideration of all the evidence in the case. It is the

kind of doubt that would make a reasonable person hesitate to act in the most important of his own affairs.

Proof beyond a reasonable doubt, therefore, must be proof of such a convincing character that you would be willing to rely and act upon it with hesitation in the most important of your own affairs.

In the event you have a reasonable doubt as to the defendant's guilt after reconsidering all the evidence before you, and these instructions, you will acquit him and say by your verdict "Not Guilty."

You are the exclusive judges of the facts proved, of the credibility of the witnesses and the weight to be given

their testimony, but the law you shall receive in these written instructions, and you must be governed thereby.

After you retire to the jury room, you should select one of your members as your Foreman. It is his or her duty to preside at your deliberations, vote with you, and when you have unanimously agreed upon a verdict, to certify to your verdict by using the appropriate form attached hereto and signing the same as Foreman.

During your deliberations in this case, you must not consider, discuss, nor relate any matters not in evidence before you. You should not consider nor mention any personal knowledge or information you may have about any fact or person

connected with this case which is not shown by the evidence.

No one has any authority to communicate with you except the officer who has you in charge. After you have retired, you may communicate with this Court in writing through this officer. Any communication relative to the cause must be written, prepared and signed by the Foreman and shall be submitted to the court through this officer. Do not attempt to talk to the officer who has you in charge, or the attorneys, or the Court, or anyone else concerning any questions you may have.

Your sole duty at this time is to determine the guilt or innocence of the defendant under the indictment in this

cause and restrict your deliberations solely to the issue of guilt or innocence of the defendant.

Following the arguments of counsel, you will retire to consider your verdict.

GEORGE KELTON, JUDGE PRESIDING
209TH DISTRICT COURT
HARRIS COUNTY, TEXAS

"This Defendant, and a Defendant in any criminal case in this country, is presumed to be innocent until his guilt has been established by legal contest, beyond a reasonable doubt. You ladies and gentlemen [of the jury] will have that burden, I guess you would call it, to determine whether or not the evidence, after you have heard it all --").

In The
Fourteenth Court of Appeals

NO. A14-92-01357-CR

CEDRIC D. SHELLEY, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 209th District Court
Harris County, Texas
Trial Court Cause No. 631357

OPINION

Appellant entered a plea of not guilty before a jury to the offense of possession with intent to deliver a controlled substance, namely cocaine, weighing at least 400 grams. TEX. HEALTH & SAFETY CODE ANN. § 481.112 (Vernon 1989). He was found guilty and the Court

assessed punishment at a fine of $1.00 and life imprisonment. Appellant brings six points of error, complaining of insufficiency of the evidence, cruel and unusual punishment, and ineffective assistance of counsel. We affirm.

We will first address appellant's second, fourth and fifth points of error, which challenge the sufficiency of the evidence to support his conviction and an affirmative finding on the use of a deadly weapon. When reviewing sufficiency of the evidence, an appellate court must decide whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable

doubt. Jackson v. Virginia, 443 U.S. 307, 319 (1979); Garrett v. State, 851 S.W.2d 853, 857 (Tex. Crim. App. 1993); Harris v. State, 781 S.W.2d 365, 366 (Tex. App. - Houston [14th Dist.] 1989, pet. ref'd). In conducting this review, the appellate court is not to re-evaluate the weight and credibility of the evidence, but is only to ensure that the trier of fact reached a rational decision. Muniz v. State, 851 S.W.2d 238, 246 (Tex. Crim. App.), cert. denied, _____ U.S. _____, 114 S.Ct. 116, 62 U.S.L.W. 3246 (1993). Simply because appellant presents a different version of the facts does not render the State's evidence insufficient. Anderson v.

State, 701 S.W.2d 868, 872 (Tex. Crim. App. 1985), cert. denied, 479 U.S. 870 (1986). The trier of facts is the sole judge of the credibility of a witness's testimony and may believe or disbelieve all or any part of the testimony. Williams v. State, 692 S.W.2d 671, 676 (Tex. Crim. App. 1984); Mohammed v. State, 814 S.W.2d 137, 139 (Tex. App.-Houston [14th Dist.), aff'd, 830 S.W.2d 953 (Tex. Cr. App. 1992). In light of this standard, we examine the facts presented at trial in the light most favorable to the jury's verdict.

Venus Williamson is a confidential informant for the Houston Police Department. One evening he was at a Houston nightclub and observed appellant

in the company of a known drug dealer. Because of appellant's association with the drug dealer, Williamson initiated a conversation with appellant, hoping to set up a drug buy. During the course of the conversation, appellant indicated to Williamson that he could obtain a quantity of cocaine. A few days later, on the afternoon of April 28, 1992, Williamson met appellant in the parking lot of a Rice market, where appellant showed him a quantity of cocaine packaged in "Colombian packing." At this time no transaction occurred, because Williamson was waiting for the presence of Officer Walter Redman, a narcotics officer with the Houston Police Department, who was

unavailable at that time. Later that evening, Williamson, Officer Redman, and appellant met in the parking lot of a Fiesta supermarket to consummate the deal.

Appellant was seated in the passenger seat of a car, driven by J.D. Woodson, and Williamson and Redman were in another car, approximately ten to fifteen feet away. When Williamson went over to the passenger side of the car where appellant was seated, appellant told him he wanted to see the money first before giving up the cocaine. When Redman said this was all right, appellant left his car and approached Redman's car, where Redman briefly showed him the money. Appellant then went back to the

other car and sat in the passenger seat. Williamson went to the car, too, and saw Woodson take a brown bag from under the car's front seat and pass it to appellant. Appellant opened the bag and pulled out a plastic bag which was later found to contain 925.1 grams of cocaine. When Williamson saw the cocaine, he signaled to Redman, who alerted the arrest team. The team moved in and arrested appellant and Woodson. During the arrest, Office Redman and Officer Louis Flores both observed a nine millimeter pistol partially under the passenger seat where appellant had been sitting. The gun was later found to be loaded.

At trial, appellant offered a completely contrary set of facts. He denied any involvement with drug sales. He claimed he never saw Williamson at the nightclub, and never offered to sell him drugs. He admitted seeing Williamson at Rice market, but denied that any actions regarding drugs ever took place. He also testified that he was only at the Fiesta parking lot because he got a ride with Woodson. He claimed he went into the Fiesta store that night and when he left the store with a tray of nachos, the police surrounded him, pointed guns at him, threw the nachos onto his clothes, and made him lie on the ground at least one hundred feet from the car, and that

he never was anywhere near the car when he was arrested.

The jury found appellant guilty of possession with intent to deliver a controlled substance. At the punishment stage, the judge made an affirmative finding that a deadly weapon had been used during the commission of the felony, and sentenced appellant to life imprisonment.

In his second point of error, appellant complains of the trial court's failure to grant his motion for an instructed verdict on the grounds that there was no evidence that appellant exercised care, custody or control over the contraband. For the purpose of appellate review, we treat a challenge to

the trial court's ruling on a motion for instructed verdict as a challenge to the sufficiency of the evidence. Madden v. State, 799 S.W.2d 683, 686 (Tex. Crim. App. 1990); Payton v. State, 830 S.W.2d 722, 730 (Tex. App.-Houston [14th Dist.] 1992, no pet.). To show unlawful possession of a controlled substance, the State must prove two elements: (1) that the accused exercised care, control, and management over the contraband; and (2) that the accused knew the substance was contraband. Id. at 730-31; Martin v. State, 753 S.W.2d 384, 387 (Tex. Crim. App. 1988).

Appellant argues that there was no evidence that he touched the cocaine, and therefore he did not have possession of

the contraband. However, we have direct evidence from the testimony of Williamson that appellant held the cocaine in his lap at the Rice market in the afternoon and showed it to Williamson, and that appellant took the cocaine out of the paper bag in preparation for selling it to Williamson at the Fiesta parking lot. This evidence establishes that appellant had care, control, and management of the contraband. See also, Arevalo v. State, 835 S.W.2d 701, 704-5 (Tex. App- Houston [14th Dist.] 1992, no pet.) (testimony that appellant held the contraband in his lap in a car was sufficient evidence to support a conviction for possession of a controlled substance). The element of

knowledge has also been established. When the accused has represented that he is selling a certain drug, and the substance he is going to sell is found to be such a drug, knowledge has been shown. Reyes v. State, 480 S.W.2d 373, 374-5 (Tex. Crim. App. 1972). Although appellant denied that any of the events testified to by Williamson and Officer Redman ever took place, the jury, by finding appellant guilty, implicitly rejected appellant's version of the facts. Adelman v. State, 828 S.W.2d 418, 422 (Tex. Crim App. 1992). We hold the evidence was sufficient to establish that appellant had possession of the

contraband. Point of error two is overruled.

In appellant's fourth point of error, he argues that because he was, at most, an agent of the buyer, he cannot be found guilty of intent to deliver a controlled substance. He argues that because he told Williamson he would obtain the drugs for him, this renders him Williamson's agent. He cites Robinson v. State, 815 S.W.2d 361 (Tex. App. - Austin 1991, pet. ref'd), in support of his argument. Robinson holds that the buyer of a controlled substance is not a party to the offense of delivery. However, appellant's reliance on Robinson is misplaced. Appellant is actually arguing that the evidence was

insufficient to show that he was the seller of the contraband and had the intent to deliver a controlled substance. We find more than enough evidence establishing that appellant was with the actual seller or an agent of the seller, and had the intent to deliver the controlled substance. First, appellant was in possession of almost one kilogram of cocaine. This quantity is enough to infer that appellant had the intent to deliver. Hurtado v. State, 722 S.W.2d 184, 188 (Tex. App. - Houston [14th Dist.] 1986, pet. ref'd); Pitts v. State, 731 S.W.2d 687, 692 (Tex. App. - Houston [1st Dist.] 1987, pet. ref'd). Second, a large amount of money was present at the

site of the transaction. See Gabriel v. State, 842 S.W.2d 328, 331 (Tex. App. - Dallas 1992, no pet.) (listing factors which establish intent to deliver). Although the money was brought to the scene by the police officer, there was evidence that appellant asked to see the money before delivering the cocaine to Williamson. This indicates that he intended to deliver the drugs in exchange for the money, thus rendering him a seller of contraband. We hold there was sufficient evidence to support the jury's finding that appellant had the intent to deliver a controlled substance. Appellant's fourth point of error is overruled.

In his fifth point of error, appellant argues that there is no evidence that he "used" a deadly weapon in the commission of the felony, because there is no evidence that he touched the gun or knew it was under the passenger seat. In order for the trial court to make an affirmative finding that a deadly weapon was used during the commission of a felony,[1] it must be shown that the weapon was utilized or employed to achieve the purpose of committing the felony. Patterson v. State, 769 S.W.2d 938, 941 (Tex. Crim. App. 1989); Jackson v. State, 857 S.W.2d 678, 682 (Tex. App. - Houston [14th Dist.] 1993, pet.ref'd). Any employment of a weapon, even simple

possession, is "using" the weapon to effectuate possession of a controlled substance when it protects and facilitates the care, custody, and management of the contraband. Id.; Vivanco v. State, 825 S.W.2d 187, 192 (Tex. App. - Houston [14th Dist.] 1992, pet. ref'd). In Patterson, the appellant was arrested while seated on a sofa. The gun was located between his leg and the arm of the sofa, and drugs were found on an end table next to him. The Austin Court of Appeals found the evidence established that the appellant "used" the weapon to possess the contraband, because the gun (1) was loaded and ready to hand, out of its holster; (2) had no lawful

purpose; and (3) was in close proximity to the contraband. Patterson v. State, 723 S.W.2d 308, 315 (Tex. App. - Austin 1987), aff'd, 769 S.W.2d 938 (Tex. Crim. App. 1989). The evidence in the case before us presents us with very similar findings: (1) the gun was loaded and close at hand under appellant's seat; (2) there was no discernible lawful purpose for the gun; and (3) the cocaine was in appellant's lap, in close proximity to the gun. We can conclude that the gun was present to protect the drugs, and therefore

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[1] Tex. Code Crim. Proc. Ann. art. 42.12 § 3g (a)(s) (Vernon Supp. 1994). An affirmative finding under this article prohibits the trial court from granting probation.

it was "used" by appellant to facilitate the possession of a controlled substance Appellant's fifth point of error is overruled.

Appellant brings three additional points of error not related to sufficiency of the evidence.

In his first point of error, appellant contends that the trial court's sentence of life imprisonment constitutes cruel and unusual punishment in violation of his constitutional rights. U.S. Const. Amend VIII; Tex. Const. Art. I, § 13. He argues the punishment is excessive in light of the fact that he had never before been convicted of a felony, he used no violence, and he was convicted on the theory that he was a

party to the offense. The statute under which appellant was sentenced states:

> An offense under Subsection (c) is . . . punishable by confinement in the Texas Department of Corrections for life or for a term of not more than 99 years or less than 15 years, and a fine not to exceed $250,000, if the amount of the controlled substance to which the offense applies is, by aggregate weight, including adulterants or dilutants, 400 grams or more.

TEX. HEALTH & SAFETY CODE ANN. § 481.112(D)(3) (Vernon 1989) (EMPHASIS ADDED).[2] Thus while appellant's sentence is lengthy, it is within the statutory limits prescribed by the Texas Legislature. When punishment assessed by a judge or jury is within the statutory limits, it is not cruel and unusual within the constitutional prohibitions.

McNew v. State, 608 S.W.2d 166, 174 (Tex.Crim.App. 1989); Servin v. State, 745 S.W.2d 40, 41-2

[2]

(Tex. App. - Houston [14th Dist.] 1987, no pet). Appellant's first point of error is overruled.

In appellant's third point of error, he contends that his attorney failed to provide reasonably effective assistance of counsels at the punishment stage of trial. The standard of review in assessing whether there was ineffective

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[2] The current provision of the Health and Safety Code is in effect until September 1, 1994. Appellant makes the argument that his punishment is excessive because the punishment for such offenses will be decreased when the new Code provisions go into effect. Appellant is incorrect. The current version is identical to the version of Section 481.112 regarding the punishment for possession of over 400 grams of a controlled substance which will become effective September 1, 1994. See TEX. HEALTH & SAFETY CODE ANN. § 481.112(f) (Vernon Supp. 1994) (effective Sept. 1, 1994).

assistance of counsel at the punishment phase of trial is first, whether counsel was reasonably likely to render effective assistance, and second, whether counsel reasonably rendered effective assistance. Craig v. State, 825 S.W.2d 128, 130 (Tex. Crim. App. 1992); Ex parte Duffy, 607 S.W.2d 507 (Tex. Crim. App. 1980). In applying the "reasonably effective assistance" standard, a reviewing court judges the full scope of assistance, consisting of representation, performance, and delivery, rather than adequacy of ability or capacity to advise clients. Ex parte Felton, 815 S.W.2d 733, 735 (Tex. Crim. App. 1991) (quoting Duffy, 607 S.W.2d at 516, n. 17).

In support of his argument, appellant attaches an affidavit from an investigator who contacted a witness to appellant's arrest. This witness allegedly could verify appellant's version of what occurred that evening. However, the affidavit is presented for the first time on appeal and is not part of the appellate record. Therefore, it is not properly before this court and we may not consider it. Huynh v. State, 833 S.W.2d 636,640 (Tex. App. - Houston [14th Dist.] 1992, no pet.); Bowler v. State, 822 S.W.2d 334 (Tex.App. - San Antonio 1992, pet. ref'd). See also, Ex parte Kunkle, 852 S.W.2d 499, 504 (Tex. Crim. App. 1993), cert. denied, ____ U.S.

_____, 114 S.Ct. 122, 126 L.Ed.2d 87 (1993) (court will not consider affidavits attached to application for writ of habeas corpus in determining the merits of appellant's claim). We are limited to a review of the totality of counsel's representation of appellant at the punishment stage. Ex parte Cruz, 739 S.W.2d 53, 58 (Tex. Crim. App. 1987). The record reflects that although counsel did not know the correct range of punishment for the Code section under which appellant was convicted, in oral argument before the trial court he reargued mitigating circumstances which had been presented at the guilt/innocence phase, including appellant's

responsibility for his mother, and the death of his father while appellant was incarcerated awaiting trial. Counsel also reemphasized the lack of evidence connecting appellant to the gun, and urged the trial court to find the deadly weapon allegation not true. In addition, there is nothing in the record to show that the result of the punishment hearing would have been any different had counsel performed differently. See Moore v. State, 694 S.W.2d 528, 531 (Tex. Crim. App. 1985). Even the prosecutor's arguments appeared to have little effect on the trial court's decision, as the State requested a sentence of 60 years, but the judge sua sponte imposed a life

sentence. We cannot find that counsel's representation fell below the lever of reasonably effective assistance. Appellant's third point of error is overruled.

In appellant's sixth and final point of error, he contends the trial court erred in entering judgment that appellant was guilty of possession with intent to deliver a least 400 grams, when the judgment rendered by the trial court specified less than 400 grams. The record shows that the trial court, when reading the jury's verdict, stated "less than 400 grams." However, the verdict form signed by the jury, and the written judgment signed by the trial judge both read "at least 400 grams." We are unable

to determine if the court reporter misheard the judge's words, or if the judge simply misspoke. In any event, even if the trial court incorrectly rendered the verdict,[3] the written order of the court controls over the oral announcement of the verdict. Eubanks v. State, 599 S.W. 2d 815, 817 (Tex. Crim. App. 1980); Francis v. State 792 S.W.2d 783, 784 (Tex. App. - Houston [14th Dist.] 1990, pet. ref'd). Therefore, the trial court did not err in entering

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[3]. "Rendition" of the judgment occurs when the court orally pronounces the verdict. "Entry" refers to the ministerial act of the clerk in recording the court's signed written declaration of judgment in the minutes of the court. Wilson v. State, 677 S.W.2d 518, 522 (Tex. Crim. App. 1984).

judgment reflecting that appellant was guilty of possession with intent to deliver "at least 400 grams" of a controlled substance. Appellant's sixth point of error is overruled.

Having overruled all of appellant's points of error, we affirm the judgment of the trial court.

/s/ Paul C. Murphy
Justice

Judgment rendered and Opinion filed January 20, 1994.

Panel consists of Justices Murphy, Ellis and Jackson B. Smith, Jr.

Do Not Publish - Tex. R. App. P. 90.

[4]

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[4] Justice Smith sitting by appointment of the Texas Supreme Court.

NO. _____

COURT OF CRIMINAL APPEALS OF TEXAS

CEDRIC D SHELLEY, APPELLANT

V.

THE STATE OF TEXAS

On Petition for Discretionary Review from

The Fourteenth Court of Appeals

In No. A-14-92-01357 CR Affirming The

Conviction in No. 631357 From The 209th Judicial

District Court of Harris County, Texas

APPELLANT'S PETITION FOR DISCRETIONARY REVIEW

GERALD FRY
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HOUSTON, TEXAS 77002
TBN: 07493800
FEDERAL I.D. NO. 2929
ATTORNEY FOR APPELLANT

NOTICE OF INTERESTED PARTIES

Pursuant to Tex. R. App. P. 74(a), the following persons are interested parties:

Presiding Judge At Trial

The Honorable George Kelton

Attorneys for State

Ms. Denise Oncken (at trial)

Mr. Calvin Hartman (on appeal)

Attorney for Appellant

Thomas Jackson (at trial)

Gerald Fry (on appeal)

GROUND OF ERROR NO. 1

The trial court erred as a matter of constitutional law violating Petitioner's rights to a fair trial under due process of law by giving the following instructions to the jury during voir dire:

> "This defendant, and a defendant in any criminal case in this country, is presumed to be innocent until; **his guilt has been established by legal contest beyond a reasonable doubt. You ladies and gentleman will have that burden. I guess you call it....."**

The jury may have interpreted such instruction as either shifting the burden of proof away from the State to the jury or totally eliminating it. The burden of proof is on the State to establish all elements of the offense beyond a reasonable doubt. Allen v. State, 686 S.W. 2d 685 (Tex. App. 4 Dist 1985).

A shift in the burden of proof of an essential element of the crime rises to constitutional proportions and renders the trial fundamentally unfair, and such error is reviewable for the first time on appeal. Id.

Fundamental error is presented where the error in the court's instructions to the jury goes to the very basis of the

case so that the charge fails to state and apply the law under which the accused is prosecuted. Martinez v. State, 576 S.W. 2d 854, 855 (Tex. Crim App. 1979). This fundamental error was not subject to being, nor ever was cured during the proceedings.

Further support for his contention under this ground that he was denied due process of law is found in Sandstrom v. Montana, 442 U.S. 510, 995 S.Ct. 2450, 61 L.Ed. 39 (1979), and Ramirez v. Jones, 530 F.Supp. 345 (1981), wherein the court stated:

> "It is patently clear that in Sandstrom the Court was concerned with the impact of the erroneous instruction

> upon the jury, and whether a reasonable juror could have interpreted the instructions as shifting or eliminating the People's burden of proof."

In Sandstrom, the court further stated that:

> "That determination requires careful attention to the words actually spoken to the jury, for whether a defendant has been accorded his constitutional rights depends upon the way in which a reasonable juror could have interpreted the instruction."

Although the Sandstrom's court went to great lengths to define and characterize presumptions and inferences, it ultimately held:

> "Because David Sandstorm's jury may have interpreted the judge's instructions as constituting either a burden shifting presumption like that in Mullaney, or a conclusive presumption like those in Morisette and United States Gypsum Co. and because either interpretation would have deprived defendant to the due process of law, we hold the instructions given

in the case ——— unconstitutional."

Your petitioner most vigorously urges that the constitutional infirmity in the Court's instructions was raised to the ultimate level of constitutional infirmity because it simply in clear and unambiguous language shifted the burden of proving his guilt from the State to the jury violating his fundamental right to a fair trial. Allen, supra.

In Sandstrom and Ramirez, supra, the court was faced with the evanescent distinctions of presumptions and inferences and their role in the fact finding process. In the case at bar, however, the trial court under color of office and authority for matters legal,

at least as perceived by the jury, placed the burden of proof not only on isolated issues but on the whole case on them.

Petitioner anticipates the State will argue that the trial court made several attempts at pronouncing a less incorrect version of the law but neither was this devastatingly egregious error made less harmful nor was it "cured". Such efforts merely exacerbated the fundamental error by further confusing the minds of the jury.

In conclusion on this point, appellant simply argues that the real test of constitutional infirmity on the matter did not devolve upon presumptions and inferences and their

characterizations in given cases, but rather as stated in Sandstrom, supra.

> "... the challenged jury instruction had the effect of relieving the State of the burden of proof enunciated in Winship on the critical question of petitioner's state of mind. "Emphasis added".

GROUND OF ERROR NO. 2

The court of appeals erred as a matter of constitutional law in holding intent to deliver may be inferred by quantity since the jury would not have been permitted to make such inference.

At the outset he most vigorously reasserts, however, that the court of

appeals erroneously characterized his fourth point of error as a challenge to the sufficiency of the evidence. Appellant now reasserts in its entirety his fourth point of error again relying in its entirety on Robinson v. State, 815 S.W. 2d 361 (Tex. App. - Austin 1991, pet. ref'd) as authority to support his contention that he was at most, an agent for the buyer and could not therefore be found guilty of intent to deliver a controlled substance.

His argument under this ground is that not only could the jury not have drawn such inference from the facts but the court of appeals was prohibited from indulging in such inference because the

charge to the jury was constitutionally infirm.

The court's charge to the jury provides:

> "**Under the law**, cocaine is a controlled substance. "Emphasis Added."

The charge then purports to define "delivery" and "possession".

The court's charge then provides:

> "A person acts intentionally, or with intent, with respect to the nature of his conduct or to a result of his conduct when it is his conscious objective or desire to engage in the conduct or cause the result."

He contends that there is no functional difference in the impact of that charge on the jury than in the constitutionally infirm charge in Sandstrom, supra, which provided:

> "The law presumes that a person intends the ordinary consequences of his voluntary acts."

In County Court of Ulster County v. Allen, 442 U.S. 140, 99 S.Ct. 2213, 60 L.Ed 2d 777 (1979), the United States Supreme Court stated:

> "The most common evidentiary device is the entirely permissive inference or presumption which allows - but does not require the trier of

fact to infer the elemental fact **from proof by the prosecutor** of the basic one and places no burden of any kind on the defendant.... In that situation the basic fact may constitute primia facie evidence of the elemental fact... When reviewing this type of device, the Court has required the party challenging - it to demonstrate its invalidity as applied to him.... Because this permissive presumption leaves the trier of fact free to credit or reject the inference and **does not shift the**

burden of proof, it affect the application of the 'beyond a reasonable doubt' standard only if, under the facts of the case, there is no rational way the trier could make the connection permitted by the inference. For only in that situation is there any risk that an explanation of the permissible inference to a jury, or its use by a jury, has caused the presumptively rational fact finder to make an erroneous factual determination."

This statement requires at least two matters to occur contemporaneously:

First - The prosecutor must prove the basic fact, and;

Second - The presumption does not shift the burden of proof.

From the United States Supreme Court definition, the prosecutor had to prove that some ill-defined amount of contraband was too much for personal use which in this case it failed to do. Therefore, intent to deliver was not permitted to be inferred by either the jury nor the appellate court.

Moreover, the definition requires a shift of the burden of proof to him to, in any event, show how much contraband is enough for personal use only.

The Supreme Court further stated in Ulster, supra.

> "The value of these evidentiary devices, and their validity under the Due Process Clause, vary from case to case, however, depending on the strength of the connection between the particular basis and elemental facts involved and on the degree to which the device contains the fact finder's freedom to assess the evidence independently."

The Petitioner specifically contends, as he is required to do that

such charge was constitutionally infirm because it:

1. Necessitated a constitutionally prohibited shift in the burden of proof from the State to him;
2. Required him to prove that an "ill defined" but given amount of contraband was enough for personal use only and;
3. Caused a presumptively rational fact-finder to make an erroneous factual determination depriving him of due process of law, as guaranteed by the Fourteenth Amendment to the United States Constitution.

In Sandstrom, supra, the court further held:

> "But, more significantly, even if a jury could have ignored the presumption and found defendant guilty because he acted knowingly, we cannot be certain that this is what they did do. As the jury's verdict was a general one, we have no way of knowing that Sandstrom was not convicted on the basis of the unconstitutional instruction. And '{i}t has long been settled that when a case is submitted to the jury on alternative theories the unconstitutionality

> of any of the theories requires that the conviction be set aside."

An unconstitutional jury instruction or an element of the crime can never constitute harmless error. Sandstrom, supra. Any "curative" efforts were ineffectual. Sandstrom, supra, footnote 7.

In summary, Petitioner contends under this point:

1. The appellate court erroneously characterized his fourth point of error as an attack on the sufficiency of the evidence.

2. He reasserts Point of Error Number 4 in its entirety as stated above.

3. The appellate court was not permitted to draw inferences on critical elements where the jury would not have been able to do so because of a constitutionally infirm instruction.

4. Fundamental error was committed.

5. The fundamental error was the proscribed requirement of a shift in the burden of proof from the State to him on intent.

GROUND OF ERROR NO. 3

The trial court committed reversible error by imposing a life sentence which was a cruel and unusual punishment.

Appellant was sentenced to life in prison for possession with intent to deliver over 400 grams of cocaine (R.V-20). This sentence both violates the United States Constitution, U.S.C.A. Const. Amend 8, and the Texas Constitution, Vernon's Ann. St. Const. Art. 1, § 13. Hutto v. Finney, 437 U.S. 678, 98 S.Ct. 25 65, 57 L.Ed 522 (1978), holds that the eight amendment prohibits more than physically laborious punishments but also prohibits grossly disproportionate penalties. This sentence is grossly disproportionate to the crime, because the appellant has never before been convicted of a felony, no violence was used by the appellant,

and he was convicted on the theory he was a party. Solem v. Helm, 463 U.S. 277, 103, S.Ct. 3001, 77 L.Ed 2d 637 (1983) holds that no penalty is per se constitutional. Each case must be considered individually. Estelle v. Gamble 97 S.Ct. R 85, 429 U.S. 97, 50 L.Ed. 2d, 25, (1976) holds that punishment which is incompatible with the evolving standards of decency that mark progress of a maturing society or which involve unnecessary or wanton infliction of pain are repugnant to the Eight Amendment. Because of the Eight Amendment reflects an evolving society, what was not cruel and unusual punishment in the past may be cruel land unusual punishment under today's standards. Texas is clearly about to change it's standards regarding punishment. The Texas Penal Code is currently under

revision. It is my understanding that the punishment for just about all drug offenses will be decreased. We clearly have reached the stage of evolution that life in prison is much too long a sentence for appellant.

GROUND OF ERROR NO. 4

The trial court committed reversible error by not granting appellant's motion for an instructed verdict.

The trial court overruled appellant's motion for an instructed verdict (R.III-62). There was no evidence that the appellant touched the cocaine or the pistol. The only evidence is that the appellant was riding in the co-defendant's automobile. Copeland v. State, 747 S.W. 2d 14 (Tex. App-Houston [1st Dist.] 1988), holds the following:

> "To establish a defendant's "unlawful

> possession" of a controlled substance the State must proved: (1) that the accused exercised care custody, and control over the substance, and (2) that the accused knew that the substance possessed was contraband."

In this case the appellant was not the driver of the automobile. He did not own the automobile. The co-defendant Woodson was the first person to display the drugs (R.III015). Woodson clearly had care, custody, and control over the cocaine. The State has to prove more than that the appellant was in close proximity to the cocaine. They must prove that it was in his actual care, custody, or control. Only Woodson can be shown to have actual care, custody, or control of the cocaine.

GROUND NO. 5

Reversible error was committed by appellant's attorney by not providing reasonably effective assistance of counsel. Appellant's attorney, Thomas Jackson, did not provide the appellant reasonably effective assistance of counsel at the punishment stage of the trial. Turner v. State, 755 S.W, 2d 207 (Tex. App. - Houston [14th Dist.] 1988) holds that the test to see if reasonably effective assistance of counsel was rendered is by judging the totality of the representation. Mr. Jackson rested with no evidence to present at the punishment stage of the trial (R.V-4). The appellant is not eligible for probation but Mr. Jackson is under the mistaken impression that he can be granted probation.

R.V - 10,11

> Mr. Jackson: "---- I believe that probation for this fellow, this young fellow would be a fitting ----."

Mr. Jackson was completely unaware that the minimum sentence was 15 years.

R.V --11

> Mr. Jackson: Of course, Your Honor my argument is the minimum is not 15 years under the circumstances.

Mr. Jackson was unaware that the chemist testified that actual weight of cocaine was 562.8 grams of pure cocaine (VIII-112).

R.V -16

> Mr. Jackson: The chemist gave the actual weight and it was less than 400 grams.

Nothing Mr. Jackson said or did at the punishment stage helped the appellant. Mr. Jackson seemed confused about the punishment hearing. If the totality of the punishment hearing is considered it is clear that the appellant was not offered reasonably effective assistance of counsel. Exhibit A is an affidavit by an investigator. Exhibit A shows that proper pretrial investigation was not done. A critical witness, Mary Moreno, was never contacted by Thomas Jackson's office.

GROUND OF ERROR NO. 6

The appellant cannot be found guilty of intent to deliver because he was an agent of the buyer.

The appellant was asked by the informant to help him obtain some cocaine. Therefore the appellant was acting as an agent of the buyer.

Robinson v. State 815 S.W. 2d 361 (Tex. App - Austin 1991) holds that the buyer of a drug is not a party to the illegal sale of the drug. Appellant is at most guilty of an intent to purchase not an intent to deliver the cocaine.

GROUND OF ERROR NO. 7

The trial court committed reversible error by finding that the appellant used a deadly weapon.

Even if Appellant is convicted under the law of parties, it must be proven that the Appellant personally used a gun, Stevenson v. State 745 S.W. 2d 45 (Tex. App. - Hou [14th] 1987). There was no evidence that appellant even knew the gun was under the seat. The only mention of the gun was the finding of it after the arrest of the Appellant. Appellant can't be "using" the gun if he didn't know it was there.

GROUND OF ERROR NO. 8

The court committed reversible error by entering a judgment reflecting that the appellant was guilty of possession with intent to deliver greater than 400 grams of cocaine.

The jury found the appellant guilty of possession with intent to deliver less than 400 grams of cocaine.

R.IV -4

> "We the jury, find the Defendant, Cedric D. Shelley, guilty of possession with intent to deliver a controlled substance, namely cocaine, weighing less than 400 grams, by aggregate weight --."

R.IV -5

> **So say you all, members of the jury?**
>
> **Jurors: Yes, sir.**

PRAYER OF RELIEF

WHEREFORE PREMISES CONSIDERED, appellant prays this Honorable Court to consider each and every point of error raised herein, to reverse appellant's conviction, and to order a judgment of acquittal or new trial as the law and justice demands.

CERTIFICATE OF SERVICE

I hereby certify that on this _____ day of March, 1994, a true and correct copy of the foregoing brief was hand delivered to the Clerk of the Court of Appeals to be deposited in the box reserved for the Harris County District Attorney's Office.

_____

GERALD FRY

OFFICIAL NOTICE August 2, 1994
COURT OF CRIMINAL APPEALS COA: 14-92-01357-CR

RE: CASE NO. 0371-94
STYLE: SHELLEY, CEDRIC D.

The Court has this day rejected the appellant's motion for rehearing for failure to comply with Rule 230 (b) T.R.A.P.

THOMAS LOWE, CLERK

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